UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 677

Case No. 744: DAURE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 23 July 1993, Bernard Dauré, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To hold that 'the fullest regard' was not given by the Respondent to the Applicant's qualifications in filling a D-1 vacancy at the Information Products Division announced as 90-1-DPI-069-NY (29 April 1991);

(b) To determine that the contractual rights of the Applicant under Article 101, paragraph 3 of the United Nations Charter, article IV of the Staff Regulations, in particular regulations 4.2 and 4.4 and staff rules 104.14(a)(ii) and 112.6 have been violated; and

(c) To order the Respondent to rescind his decision to fill the post in question through a lateral move, ..., to fix the appropriate amount of compensation payable to the Applicant for the injury sustained by him should the Secretrary-General decide in the interest of the United Nations that the Applicant be compensated without further action being taken in his case."

Whereas the Respondent filed his answer on 11 May 1994;

Whereas the Applicant filed written observations on 8 June 1994;

Whereas the Applicant submitted further written observations on 29 September 1994;

Whereas the Tribunal put questions to the Respondent on 19 October 1994, to which he replied on 26 October 1994;

Whereas further documentation was submitted to the Tribunal, directly by the Office of Human Resources Management, on 28 October 1994;

Whereas the Applicant submitted further observations on 31 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 19 November 1967, as a Translator in the French Section, Translation Service, Office of Conference Services, at the P-3 level. His probationary appointment was converted to a permanent one on 1 November 1969. With effect from 16 February 1971, the Applicant was assigned, as an Editor, to the Editorial and Official Records Service, Official Records Editing Section. On 1 May 1974, he was transferred to the Department of Economic and Social Affairs, Office of Technical Cooperation, Support Services Branch, Reports Section. His title was changed to Technical Editor, with effect from 1 May 1975. He was promoted to the P-4 level, with effect from 1 September 1977, and on 1 April 1978, he was transferred to the Department of Technical Cooperation for Development. His functional title was changed to Chief, Reports Unit, Programme Support Division, with effect from 1 July 1983. On 1 April 1986, he was promoted to the P-5 level.

On 26 April 1991, in response to a Vacancy Announcement, the Applicant applied for the D-1 level post of Chief of Publications Service, Information Products Division, Department of Public Information (DPI). In a letter dated 8 May 1991, the Senior Recruitment and Placement Officer acknowledged receipt of the Applicant's application for the vacancy.

According to the record, 13 internal and 22 external candidates applied for the post. The Secretary-General approved the recruitment of an external candidate who, however, declined the appointment. Shortly thereafter, on 6 February 1992, the Secretary-General announced the suspension of all external recruitment for posts in the Professional category. In a memorandum dated 2 March 1992, to all Directors and Chiefs of Service in DPI, the Under-Secretary-General for Public Information announced the implementation of several staff changes within DPI, including the lateral transfer of the Deputy Director, Dissemination Division, to the post of Chief, Publications Service, Information Products Division.

In a memorandum dated 8 May 1992, the Applicant requested from the Senior Recruitment and Placement Officer "to be told in writing what happened to my application." In a reply dated 13 May 1992, the Senior Recruitment and Placement Officer informed the Applicant that the post for which he had applied had been filled through a lateral transfer.

In a letter dated 21 May 1992, the Applicant requested the Secretary-General to review the administrative decision not to select him for the post for which he had applied. Not having received a substantive reply, the Applicant, on 30 July 1992, lodged an appeal with the Joint Appeals Board (JAB). He claimed that "the qualifications of the staff member who was selected are less appropriate to the post than mine" and suggested that "extraneous considerations" influenced the selection of a candidate. On 22 September 1992, the Applicant filed a supplementary statement of appeal.

The JAB adopted its report on 23 April 1993. Its considerations, conclusions and recommendations read, in part, as follows:

"...

29. The Panel also noted that para. 6 of administrative instruction ST/AI/373 on placement and promotion, dated

23 December 1991, states that 'Heads of Departments and Offices may reassign staff within their Departments or offices to vacant posts at the same level.' Accordingly, the Panel found that in assigning a staff member at the D-1 level to fill the post in question, the Administration had acted within its authority, that such assignment did not require approval by the Appointment and Promotion Board, nor was there any need for the Administration to take other staff members' candidatures into consideration.

Conclusions and recommendations

30. The Panel concluded that the decision not to select the Appellant for the post in question was not improperly taken and, therefore, found no violation of the terms of his appointment.

31. The Panel took note, however, of the Appellant's uncontroverted contention that his performance had not been evaluated since 31 December 1984 - in violation of ST/AI/240/Rev.2. The Panel considers this situation unacceptable and recommends that the Appellant's performance be evaluated without further delay.

32. Accordingly, the Panel makes no further recommendation in support of this appeal."

On 27 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and agreed with its conclusion that the decision not to select you for the post in question did not violate the terms of your appointment. No action on your appeal will, therefore, be taken.

The Secretary-General noted the Board's concern in regard to irregularities in the evaluation of your performance and directed that it should be carried out immediately."

On 23 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given full and fair consideration when he applied for the post at issue because there had been no performance evaluation report since December 1984.

2. The burden of proof is on the Respondent to show that the Applicant was duly considered for the post. The Respondent has not provided this proof.

3. The Secretary-General's discretionary decision not to promote the Applicant was tainted by lack of due process.

Whereas the Respondent's principal contention is:

The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-selection for the post in question.

The Tribunal, having deliberated from 19 October to 9 November 1994, now pronounces the following judgement:

I. The Applicant claims that he was not duly considered for the D-1 post of Chief of Publications Service, Information Products Division, DPI, for which he had applied, in accordance with the Vacancy Management System (VMS) then in force. As a result of the selection process, an external candidate was selected but declined the appointment. Because of the recruitment freeze in force at the time, the post was then filled through the lateral transfer of another staff member. The Applicant also claims that he was not informed of the negative outcome of his application for the post until he inquired about it and that this reply came when the decision to fill the post through a lateral transfer had already been taken.

II. The Applicant claims that, as a consequence of flaws in the original selection process, the decision to fill the post through a

lateral transfer should be rescinded and compensation granted to him. The Applicant considers it "irrelevant" that the post was eventually filled through the lateral transfer of another staff member. In his written observations, he clearly states that "the fact that the external candidate declined the offer and that an internal candidate was later assigned to the post does not absolve the Respondent from having violated due process and the Applicant's contractual rights in the first instance when the post was considered by the APB [Appointment and Promotion Board]."

III. The Tribunal is unable to agree with the Applicant's contention. As the Tribunal has previously held, under the VMS (which is no longer in effect) the Respondent was entitled to fill a vacancy through a lateral transfer rather than promotion. See also administrative instruction ST/AI/273, paragraph 6. A staff member who is seeking promotion and hence was not eligible to be considered for a lateral transfer, as was the case of the Applicant here, lacks standing to challenge a lateral transfer. (Cf. Judgements No. 661, Al Atraqchi (1994) and No. 657, Araim (1994)). The Tribunal therefore need not consider the issues raised by the Applicant concerning the outcome of the original selection process.

IV. The Tribunal nevertheless requested the Respondent to provide "... minutes, correspondence, notes or other records of the APB establishing that the Applicant was considered [for promotion]". In response, the Respondent submitted the Office of Human Resources Management's evaluation of the candidates and that of the APB. Although the documentation provided shows that the Applicant was considered, it also shows that he was not afforded the opportunity to comment, as required by administrative instruction ST/AI/338/Add.5, and that he was not informed of his non-inclusion in the short list that should have been established by the APB. Moreover the Applicant was not informed of the outcome of the selection process until after the candidate selected had declined the appointment and the recruitment freeze had led to the decision

to fill the post by a lateral transfer. These are procedural shortcomings that should have been avoided. In addition, the APB, in carrying out its advisory functions, should ensure that its recommendations are based on its own independent evaluation rather than on mere acquiescence in the wishes of a department, as may have been the case here. Finally, the Tribunal notes the points raised by the Applicant concerning the lack of a recent report on his performance. While this appears to have had no adverse effect in the circumstances of this case, it is, of course, the responsibility of the Administration, in the first instance, to prepare a performance evaluation report on a timely basis. If it fails to do so, a staff member, instead of remaining silent for a lengthy period, may make the delinquency known promptly and request corrective action.

V. The circumstances set forth above rendered any procedural shortcomings in the selection process academic. Consequently, the application fails.

VI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 9 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary